Analysis

Headless chickens: *Morrisons* and the FTT's supervisory jurisdiction

Speed read

The recent FTT decision in *WM Morrison Supermarkets Ltd* involved yet another case on the VAT treatment of food – this time, cool-down rotisserie chickens. However, the FTT devoted more than 100 paragraphs to the question of whether it even had jurisdiction to consider the taxpayer's legitimate expectation arguments. For many tax practitioners, this will be a stark reminder of one of the thorniest issues plaguing tax disputes. In practice, where taxpayers wish to pursue public law arguments as part of their case against HMRC, they are often forced to issue parallel proceedings in both the FTT and the Administrative Court. This additional layer of procedural complexity can have significant implications for time and cost, causing real prejudice to taxpayers and undermining the efficient resolution of disputes. Has the time now come for reform?

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Current position

In most tax disputes, Parliament has provided a statutory right of appeal against HMRC decisions to the First-tier Tribunal (Tax Chamber) (FTT) (with further appeals, where appropriate, to the higher courts).

As a public body, the manner in which HMRC makes decisions (separate to the technical merits of a tax decision) is subject to public law and capable of judicial review. Some HMRC decisions carry no statutory right of appeal whatsoever (for example, the issuance of Financial Institution Notices under FA 2008 Sch 36 para 4A). In those cases, judicial review may be the only potential remedy.

A growing proportion of HMRC's decision-making now engages public law arguments. At the same time, there is an increasing number of cases before the FTT seeking to raise arguments (in particular, where the relevant statutory construction may allow this and following the decision of the Upper Tribunal (UT) in *KSM Henryk Zeman SP Z.o.o v HMRC* [2021] UKUT 182 (TCC)). However, the FTT ultimately remains a creature of statute: neither the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) nor the FTT's own procedural rules confer any express supervisory jurisdiction, and the orthodox view continues to be that judicial review generally belongs elsewhere.

In this environment, taxpayers can find themselves navigating a procedural labyrinth. In particular, where a taxpayer has a statutory right of appeal but wishes to also raise public law arguments, this typically requires running parallel proceedings in the FTT and the Administrative Court, with one stayed behind the other, adding cost, delay and potential prejudice. Strict time limits in judicial review force early decisions, often before the facts and law are fully developed, and the bar for substantive success is high.

Morrisons and other recent decisions

In *WM Morrison Supermarkets Ltd v HMRC* [2025] UKFTT 1542 (TC), the taxpayer's primary case was that its cool-down rotisserie chickens were zero-rated food rather than 'hot food' within Note 3B to VATA 1994 Sch 8 Group 1. In the alternative, it contended that HMRC's dealings with it between 2012 and 2014 gave rise to a legitimate expectation that those supplies would be treated as zero-rated. That alternative argument led the taxpayer to issue, and then stay, a parallel judicial review claim in the Administrative Court.

> The fact that 100 paragraphs of the decision was devoted to the jurisdiction question alone perfectly illustrates the significant time, cost and doctrinal complexity in resolving whether such public law arguments can be heard in the FTT

As a preliminary issue, the FTT had to decide whether, on appeal under VATA 1994 s 83(1)(p), it had jurisdiction to determine that legitimate expectation ground. The FTT explored some of the relevant case history, including the UT's decision in *Zeman*. HMRC argued that the decision in *Zeman* was not binding because it was either *obiter* or reached *per incuriam*. HMRC also launched what the FTT described as an 'all guns blazing' attack on the UT's findings. The FTT held that the decision in Zeman is wrong (albeit apparently not 'plainly wrong'). The FTT did not consider itself bound by that decision, but decided to follow it in any case. On that basis, it eventually decided that it had jurisdiction to consider the taxpayer's legitimate expectation arguments – before then ultimately dismissing those arguments on their merits anyway.

The fact that the FTT devoted more than 100 paragraphs of its decision to the jurisdiction question alone perfectly illustrates the significant time, cost and doctrinal complexity involved in resolving whether such public law arguments can be heard in the FTT.

Whilst highly fact-specific disputes like *Morrisons* create real conundrums for taxpayers, certain statutory provisions may allow the FTT to consider public law issues within its appeal jurisdiction. One example is the discretion in reg 29(2) of the Value Added Tax Regulations, SI 1995/2518, which allows HMRC to permit the deduction of input tax where a taxpayer cannot produce a VAT invoice but provides alternative evidence. A good recent example is *PRB Trading Ltd v HMRC* [2026] UKFTT 47 (TC) (though the decision erroneously refers to VATA 1994 rather than SI 1995/2518). In *PRB*, the FTT followed a line of established case law relating to this provision and observed that, because the jurisdiction conferred on it by reg 29(2) was 'supervisory in

nature', the wider question of any legitimate expectation was something it could consider.

In such circumstances, however, it is not always clear where the boundaries between public law principles and FTT procedure are drawn. Under rule 27(2) of the FTT rules (SI 2009/273), parties to a tax appeal must provide each other with a list of documents on which they intend to rely (of course, applications for further disclosure can be made to the FTT during the course of an appeal). In most appeals it will be assumed that HMRC have already reviewed this material, having collated it during the enquiry process. This contrasts with judicial review proceedings, where the public law duty of candour applies and may require disclosure of relevant documents that would not ordinarily be used in an appeal before the FTT. How that duty is to be approached within the FTT's statutory appeal framework remains a point to watch. In *Natural Balance Foods Ltd v HMRC* [2025] UKFTT 1555 (TC), the FTT indicated that HMRC's public law duty of candour applied where public law arguments were live in the appeal – a potentially notable development for taxpayers, and one that suggests that FTT judges may be prepared to adopt a relatively broad approach when addressing certain procedural discrepancies.

Fixing the broken chicken coop

The only complete solution to the procedural nightmare potentially faced by taxpayers, as illustrated in *Morrisons*, is to expand the FTT's powers to consider public law issues. Primary legislation (for example by amendment to the TCEA 2007) could make explicit that, where relevant to the subject matter of an appeal, the FTT may determine whether HMRC's decision was also unlawful on public law grounds, including legitimate expectation, and could confer corresponding remedial powers. However, this would demand political time and goodwill, and it would inevitably be slow to implement.

A potentially more immediate reform would be to amend the FTT rules. In *Morrisons*, the taxpayer's judicial review claim had been transferred to the UT (which, unlike the FTT, does have public law jurisdiction). The FTT judge queried why the parties had not sought to also have the tax appeal transferred to the UT (which is possible pursuant to rule 28). The FTT noted that this would have allowed the appeal and judicial review claim to be heard together without needing to engage the question of the FTT's jurisdiction. Apparently neither party had a particularly compelling answer to that question. In any case, taxpayers currently rely on HMRC's agreement to do this, as well as permission from the FTT and UT. The FTT rules could therefore be amended so that, where an appeal is associated with a parallel judicial review claim, a transfer application to the UT is presumptively or even automatically granted. This would not eliminate the need to issue a separate judicial review claim and that claim would still have to be transferred from the Administrative Court to the UT (plus the UT would need to consent to hearing the substantive tax case). However, it would at least remove one layer of procedural friction.

As another interim measure, the FTT could issue a practice statement or formal guidance addressing public law issues in tax appeals. FTT users have recently seen a similar statement in relation to extensions of time. This practice statement could set out the circumstances in which the FTT may be prepared to entertain legitimate expectation or other public law arguments, and explain how it will approach questions such as the duty of candour, disclosure of HMRC's internal material and the interaction with parallel judicial review proceedings. As with changes to the FTT Rules, such a practice statement could not confer jurisdiction that does not exist and may be difficult given the need to interpret specific statue, but it would signal the FTT's view of the general scope of its powers and preferred procedures – and might, at the very least, spare future FTT panels another hundred paragraphs on jurisdiction.

Cooling down expectations: what should taxpayers do today?

The current position is clearly unsatisfactory. However, in the absence of immediate reform, taxpayers who wish to rely on public law arguments must take a proactive approach. Key points to consider include the following:

1. **Front-load the jurisdictional analysis**: At the outset, consider whether an FTT appeal alone is likely to be sufficient, or whether a judicial review claim is also needed, taking into account costs, time limits and prospects of success. If there is any uncertainty whatsoever about the FTT's jurisdiction to hear relevant public law arguments (which is likely), taxpayers will unfortunately need to consider a 'belt and braces' approach and issue dual proceedings.

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2. **Watch time limits and pinpoint the decision under challenge**: CPR rule 54.5(1) requires a judicial review claim to be filed promptly and, in any event, not later than three months after the grounds to make the claim first arose. The three-month limit should be treated as a long-stop, rather than as a final deadline. In some circumstances, care may also be needed to identify which decision is being challenged.
3. **Judicial review is a remedy of last resort:** The courts continue to apply the 'alternative remedy' principle strictly. Where there is a viable statutory right of appeal, judicial review may be refused; equally, where the scope of the appeal is unclear, taxpayers should record their reasoning as to why judicial review is (or is not) being pursued in parallel. Taxpayers should be alert to situations like *R (on the application of Archer) v HMRC* [2017] EWHC 296 (Admin), where an application for judicial review was dismissed on the basis that the taxpayer had an effective right of appeal. There is also a growing risk of abuse of process arguments where taxpayers seek to run, in judicial review, points that the courts consider could and should have been pursued in the FTT. Conversely, if a taxpayer pursues only an appeal and then belatedly attempts to challenge HMRC's conduct via judicial review, aside from the question of time limits, the court may conclude that the judicial review is being used to re-litigate matters already determined or to circumvent the statutory appeal scheme. ■

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- Cases: *WM Morrison Supermarkets plc v HMRC* (21.2.26)
- *KSM Henryk Zeman*: FTT and legitimate expectation revisited (C Boyd & C Robins, 10.9.21)
- Rectification in the FTT: the fix for a lack of jurisdiction (G Sanitt & S Rhind, 28.6.24)